IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 818 OF 2000

Rakesh Shyamsundar Sharma ..... Appellant.

versus

The State of Maharashtra..... Respondents.

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Shri A.P.Apte for the appellant.
Snmt. P.H.Kantharia APP for the State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 7TH SEPTEMBER, 2004.

ORAL JUDGMENT (Per Palshikar J.);

1. Being aggrieved by the judgment and conviction passed by the III Additional Sessions Judge, Kalyan in Sessions Case No.1619 of 1996 convicting the accused no.1 under section 302 of IPC to suffer imprisonment for life and to pay a fine of Rs. 20,000/- in default of payment to undergo R.I. for two years, this appeal has been preferred on the ground mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of Shri A.P.Apte advocate for

the accused/appellant, and Additional P.P. Mrs. P.H.Kantharia, we have scrutinised the record and re-appreciated the evidence on record, on the basis of which the learned trial Judge passed the order of conviction.

3. The prosecution case as disclosed by our re-appreciation of evidence stated briefly is that around mid night on 4th March 1996, it being the night of Holi, deceased Tayappa along with others were awoke and standing around when they saw some persons going towards Pragati Maidan in Kalyan East. They therefore accosted those persons. There was altercations between the residents and the intruders. Accused Rakesh took up a weapon and stabbed Tayappa and then the accused persons ran away. Police thereafter arrived on the scene of offence, investigated the matter and the accused persons were prosecuted for causing murder of Tayappa.

4. The prosecution examined nine witnesses to prove its case and it was on appreciation of evidence that the learned Judge came to the conclusion of guilt and he convicted the accused No.1 under section 302 of IPC and convicted accused Nos.2 and 3 under section 323 read with 34 of IPC and sentenced them to suffer R.I.

for one month. Accused Nos.2 and 3 having underwent the sentence, have not challenged their conviction. However the present appeal is by accused no.1 directed against his conviction under section 302 of IPC as ordered by the learned trial Judge.

5. We have heard the learned counsel for the appellant and the learned APP. As aforesaid with their assistance we have re-examined and re-assessed the oral and other evidence on record. Our re-appreciation makes it clear that the death of Tayappa was homicidal that accused no.1 was responsible for the death and no error either of law or of fact has committed by the trial Judge in coming to the conclusion of guilt. We have considered and scrutinised the findings recorded by the learned trial Judge and we are in respectful agreement with those findings.

6. It will be seen that almost all the facts leading to the stabbing are admitted. It is not in dispute that Tayappa along with two others accosted the accused persons demanding their explanations to why they were around Pragati Maidan at 1.30 in the night. It is also true that being enraged by this query, accused no.1 took out a knife and stabbed Tayappa. It is an admitted case that this is a case of one stabbing only.

With this the learned Judge considered the evidence in its proper perspective. The submission of the learned advocate is that the conviction is unsustainable under section 302 of IPC as there is total lack of evidence of intention to commit murder. Our re-scrutiny of the evidence on record also does not disclose any evidence of such intention. At the same time there is no running away from the fact that the accused no.1 did stab Tayappa which resulted in his death. It also goes without saying that in such a case of stabbing knowledge that death is likely to cause must be attributed to the maker of the injury. That being so, in our opinion, it is a clear case of culpable homicide in the heat of moment and heat of anger created by the moment while accosting the accused persons. We therefore do not agree with the learned trial Judge. when he convicts the appellant under section 302 IPC and that finding is liable to be set aside. In our opinion interest of justice would be made if the accused is convicted under section 304-II IPC and sentence to suffer R.I. for a period of 9 years. We are informed that the accused is already in jail for nine years. He may therefore be released if the period of nine years is completed and the accused has to deposit a fine of Rs. 20,000/-. If such deposit of fine is not made the accused should undergo the

punishment awarded by the trial Judge in default of payment of fine. Accused shall be at liberty to deposit the fine, if he is not already done so.

8. In the result, therefore the appeal is partly allowed. Conviction under section 302 IPC is set aside. Instead the accused is convicted under section 304-II IPC and sentenced as aforesaid. The appeal accordingly disposed of.

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